

A Punithavati @ Pushpambigai Ponniah v Goh Mary & Ors

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO
W-02-924-04 OF 2013
ABDUL WAHAB PATAIL, HAMID SULTAN AND UMI KALTHUM
JJCA
21 APRIL 2016

C *Trusts — Administration of estate — Executor/executrix — Remuneration*
— Appellant previous executrix of estate of deceased — Consent order entered by
both parties in relation with estate — Respondents failed to disclosed assets for
purpose of consent order — Whether trial court ascertained value of assets
D *— Whether there was miscarriage of justice — Whether trial court right in its*
decision — Probate and Administration Act 1959 s 43

E The appellant was the previous executrix and trustee of the estate of one
Ganendra a/l Ponnusamy ('the deceased') whereas the respondents were the
beneficiaries. The appellant brought an action against the respondents for her
remuneration as the previous executrix and trustee of the estate based on the
consent order dated 25 August 2008. The appellant argued that the
respondents were not helpful in disclosing the assets of the property of the
estate and/or the relevant documents for valuation of the assets for
F remuneration to be dealt with as per the consent order. At the end of the
proceedings, the learned trial court judge awarded RM350,000 to the
appellant. Being dissatisfied with the award, the appellant filed this appeal
pursuant to s 43 of the Probate and Administration Act 1959 ('the Act') and/or
s 46 of the Trustee Act 1949 ('the TA'). The appellant submitted that the
G computation of award by the learned judge did not reflect her findings on the
total value of the deceased's estate and also the appellant entitlement to 5% of
the value of the estate as provided for under s 43 of the Act. The appellant also
submitted that this was a proper case for this court to vary the award given by
the trial court as the remuneration awarded by the trial judge was grossly
H inadequate and disproportionate to the magnitude and complexity of the
administration of the estate.

Held, allowing the appeal in part with no order as to costs:

I (1) Based on the appeal records, the learned trial judge had failed to ascertain
the value of the assets before dealing with the issue of remuneration.
Taking into consideration the consent order, the provisions of s 43 of the
Act as well as s 46 of the TA and decided that a mistrial had indeed
occurred which caused miscarriage of justice. The court ordered the case
to be remitted to the trial court (see paras 11–12).

[Bahasa Malaysia summary]

Perayu adalah bekas pentadbir dan pemegang amanah estet seorang yang bernama Ganendra a/l Ponnusamy ('si mati') manakala responden-responden adalah benefisiari-benefisiari. Perayu membawa tindakan terhadap responden-responden untuk ganjarannya sebagai bekas pentadbir dan pemegang amanah estet berdasarkan atas perintah izin bertarikh 25 Ogos 2008. Perayu berhujah bahawa responden-responden tidak membantu dalam mengemukakan aset-aset hartanah estet dan/atau dokumen-dokumen relevan untuk penilaian aset-aset bagi menguruskan ganjaran seperti perintah izin. Pada akhir prosiding, hakim perbicaraan yang bijaksana mengawardkan RM350,000 kepada perayu. Tidak berpuas hati dengan award tersebut, perayu memfailkan rayuan ini berikutan s 43 Akta Probet dan Pentadbiran 1959 ('Akta') dan/atau s 46 Akta Pemegang Amanah 1949 ('APA'). Perayu berhujah bahawa pengiraan award oleh hakim bicara yang bijaksana tidak membayangkan dapatannya atas jumlah nilai estet si mati dan juga hak perayu kepada 5% terhadap nilai estet seperti yang diperuntukkan di bawah s 43 Akta. Perayu juga berhujah bahawa ini adalah kes betul bagi mahkamah ini untuk mempelbagaikan award yang diberikan oleh mahkamah bicara kerana ganjaran yang diawardkan oleh hakim perbicaraan adalah tidak mencukupi dan tidak seimbang dengan besarnya dan kerumitan pentadbiran estet.

Diputuskan, membenarkan sebahagian rayuan tanpa perintah kepada kos:

- (1) Berdasarkan rekod rayuan, hakim bicara yang bijaksana telah gagal untuk memastikan nilai aset-aset sebelum berurusan dengan isu ganjaran. Mengambil kira perintah izin, peruntukan-peruntukan s 43 Akta dan juga s 46 APA dan memutuskan bahawa perbicaraan silap memang berlaku yang menyebabkan ketidakadilan. Mahkamah memerintahkan kes diremit semula ke mahkamah perbicaraan (lihat perenggan 11–12).]

Notes

For cases on administration of estate in general, see 12(2) *Mallal's Digest* (5th Ed, 2015) paras 2971–2983.

Legislation referred to

Probate and Administration Act 1959 s 43
Trustee Act 1949 s 46

Appeal from: Originating Summons No S-24–1411 of 2009 (High Court, Kuala Lumpur)

Gopal Sri Ram (Mahendran Chelliah and CK Lim with him) (RR Chelliah Brothers) for the appellant.

Malik Imtiaz Sarwar (S Kanaga Sundran, P Sathiesh, Pavendeep Singh and Yvonne Lim with him) (Raja Seelan & Assoc) for the respondents.

A Hamid Sultan JCA:

B [1] The appellant appeals in relation to her remuneration pursuant to s 43 of the Probate and Administration Act 1959 ('the PAA 1959') and or s 46 of the Trustee Act 1949 ('the TA 1949') and the cross-appeal of the respondent came up for hearing on 20 November 2014. Upon hearing the appeal, we take the view on the factual matrix that it is a fit and proper case to remit it back to the High Court for the High Court first to ascertain the value of the assets and thereafter decide the remuneration as per the relevant provisions of the law. In consequence, the cross-appeal is dismissed. The High Court is also given full liberty to give any directions to ascertain the value of the assets.

D [2] In addition, at the request of the plaintiff, we also note that the sum of RM415,157.53 previously paid to the appellant be credited against any payment due and the appellant has to return any excess (if any) upon the final order of the court. The appeal is allowed in part.

BRIEF FACTS

E [3] The factual background of the case is complicated because of the acrimonious relationship of the parties. It is unnecessary to deal with the facts as the appellant's/plaintiff's rights and entitlement to remuneration has been crystallised by a consent order. *What the learned trial judge did not do was to crystallise the value of assets to give effect to the terms of the consent order* (emphasis added).

G [4] In the instant case, the appellant/plaintiff was the previous executrix and trustee of the estate. The respondents/defendants are the beneficiaries and the second and fifth defendants are now the administrators of the estate. The beneficiaries and/or the administrators were not helpful in disclosing the assets of the property of the estate and/or the relevant documents for any meaningful valuation of the assets for remuneration to be dealt with as per the consent order.

H [5] The learned trial judge has captured the resistance of the respondents as follows:

I 14. It is not disputed that the deceased died a very rich man and had left considerable assets. The plaintiff has alleged that the true value of his assets cannot be obtained as the defendants have not cooperated fully in disclosing all the assets of the deceased. From the evidence adduced, I agree with the plaintiff that there was no full disclosure of the deceased's assets by the beneficiaries.

15. It is not disputed that from the day she was appointed as executrix and trustee in 1994 till today the plaintiff has not been paid a single sen for all her pains and troubles. The defendants contend that there was no agreement to pay her under the

deceased's will and conceded that as far as the deceased's family members were concerned, there was an agreement to pay her RM150,000 which they are prepared to honour.

A

16. Be that as it may, having considered all the above mentioned factors I am of the view that the sum of RM350,000 is a fair and reasonable sum as the plaintiffs remuneration as executrix and trustee of the deceased's estate.

B

[6] From the face of the judgment, it is clear that the learned trial judge had not ascertained the value of the assets and ordered remuneration as per the consent terms.

C

[7] The consent terms dated 25 August 2004 reads as follows:

IT IS BY CONSENT HEREBY ORDERED that the 1st Defendant, without admission of liability, be and is hereby discharged as the Executrix and Trustee of the Estate of Ganendra son of Ponnusamy, Deceased (the 'Deceased's Estate') and that the 1st Defendant's costs be agreed or taxed by the Court and paid to the 1st Defendant *AND IT IS FURTHER BY CONSENT ORDERED* that the 1st Defendant's remuneration as Executrix and Trustee of the Deceased's Estate be taxed by the Court in accordance with Section 43 of the Probate and Administration Act 1959 and/or Section 46 of the Trustee Act 1949 *AND IT IS ALSO BY CONSENT ORDERED* that the 1st Defendant shall be indemnified against any claim brought against the Deceased's Estate in respect of any actionable wrong after 21.7.2000 and the 1st Defendant undertaking to the Deceased's Estate as follows:

D

E

- (a) within 14 days hereof, to deliver up all documents including accounting documents and notes in the 1st Defendant's custody, possession or control to the 3rd to 7th Defendants' solicitors; and
- (b) to provide and co-operate on the provision of accounts and all matters related to the Deceased's Estate;

F

G

AND UPON the 2nd Defendant desiring to withdraw as Executor and Trustee of the Deceased's Estate *IT IS BY CONSENT ORDERED* that the 2nd Defendant be and is hereby discharged as Executor and Trustee of the Deceased's Estate upon the same terms and undertaking as stipulated aforesaid in relation to the 1st Defendant save that the 2nd Defendant does not seek any remuneration as Executor and Trustee of the Deceased's Estate *AND IT IS ALSO BY CONSENT ORDERED* that the Grant of Probate dated 17.5.1994 of the Deceased's Estate be and is hereby revoked *AND IT IS FURTHER BY CONSENT ORDERED* that Letters of Administration with the Last Will and Testament Ganendra son of Ponnusamy dated 12.1.1994 annexed thereto be and is hereby granted in favour of the 3rd Defendant, Ganendra Torquil @ Torkil a/l Ponnusamy Ganendra (NRIC No. 520529-71-5073) and the 6th Defendant, Dennis Ganendra (NRIC No. 651230-07-5497) *AND IT IS LASTLY BY CONSENT ORDERED* that the parties do have liberty to apply, without prejudice to the aforesaid terms of settlement.

H

I

Dated this 25th day of August 2004.

A [8] The memorandum of appeal of the appellant reads as follows:

- B 1. The learned judge erred in law on the interpretation of conduct in Section 43 of the Probate and Administration Act 1959 in the light of the binding effect of the Consent Order and in the light of Section 46 of the Trustee Act 1949 contrary to the interpretation of two other High Courts on the very same issues.
- C 2. The learned Judge erred in law in failing to fully appreciate that any allegation of misconduct on the part of the Appellant was no longer an issue as the same had merged into a Consent order dated 24.8.2004.
- D 3. The learned judge failed to appreciate that in the taxation of the Appellant's remuneration she needed only to consider 'the circumstances of the case, the character of the dispute, the catalogue of work done, the complexity of the matter and such other concerns that would invariably find its way into what is referred to as the discretion of the Court' and not the Appellant's alleged misconduct which was by reason of the Consent Order extinguished.
- E 4. Whilst making a finding of fact that there was acrimony towards Amanda by the Respondents which in no measure caused Amanda to commit suicide the learned Judge contradicted herself and erred in holding that the Appellant misconducted herself, though not serious, as she appeared to be overzealous in trying to protect Amanda. The trial Judge failed to give sufficient or any weight to the compelling circumstances that required the Appellant to give Amanda's interest the fullest protection.
- F 5. The trial Judge's finding of fact that the true value of the assets of the Estate could not be obtained because the Respondents were not cooperative in fully disclosing all the assets of the Estate ought to have concluded that in the administration of the Estate the Appellant's work became more arduous, laborious and strenuous, entitling the Appellant to her full 5% of the value of the Estate.
- G 6. The trial Judge's finding of fact that the Respondents received allowances – and salaries since the demise of the Deceased ie from February 1994, whilst the Appellant was not paid a single cent for her work for the ten years as administrator ought to have accordingly concluded that Respondents deliberately with the utmost degree of malice and vindictiveness kept her out of her remuneration for over 18 years.
- H 7. The trial judge, having concluded that the deceased was a very rich man with considerable assets, but true value of the Estate could not be obtained as the Defendants had not cooperated and there had not been full disclosure of the deceased assets by them, ought to have taken the projected value of RM211 million as a fair estimate of the Estate which was premised on the capitalisation method of valuation on available material before her.
- I 8. On the findings of the trial Judge that Arthur Andersons valuation represented a fair and more reasonable estimate of the Estate which valuation amounted to about RM20 million (excluding Ganendra Ahmad & Partners (GAA)) and on the findings of the trial Judge that the value of GAA based on the Respondents own suit against an ex-partner, Teoh was RM20 million plus, totalling RM40 million, the computation of her award of RM350,000.00 did not reflect her findings in that;
- (i) having held that there was no serious misconduct, the Plaintiff was

entitled to 5% of the value of the Estate as provided for under Section 43 of the Probate and Administration Act 1959;

A

- (ii) having valued the Estate at RM40 million the correct computation of the Plaintiff remuneration ought to have amounted to RM2,000,000.00(5% of RM40,000,000.00)

B

9. The learned Judge erred in law in failing to award interest on the taxed remuneration from the date of the Consent Order dated 24.8.2004 at the rate of 8% per annum till the 31.12.2012 and 5% per annum from the 1.1.2013 to realisation.

10. In all the circumstances of the case the Learned Trial Judge awarded remuneration that was grossly inadequate and disproportionate to the magnitude and complexity of the administration of the Estate, making this an appropriate case for the Court of Appeal to vary the award as follows.

C

- (i) The remuneration of RM350,000 awarded as remuneration be increased to RM2 million;
- (ii) The costs of RM10,000.00 be increased.
- (iii) That interest at the rate of 8% per annum be awarded on the judgment sum from the 20.4.2004 to the 31.12.2012 and at the rate 5% per annum from the 1.1.2013 to the 9.3.2013 (date of realisation).

D

E

[9] Section 43 of the PAA 1959 reads as follows:

43(1) The Court may in its own discretion allow the executors or administrators a commission not exceeding five per centum on the value of the assets collected by them, but in the allowance or disallowance of the commission the Court shall be guided by its approval or otherwise of their conduct in the administration of the estate.

F

(2) The Registrar may in the course of the taking of the administration accounts of executors or administrators exercise the powers conferred on the Court by subsection (1).

G

[10] Section 46 of the TA 1949 reads as follows:

The Court may allow any trustee, other than Public Trustee, such remuneration for his services as trustee as the Court may think fit.

H

[11] We have read the appeal records and the submissions of the parties. After giving much consideration to the submission of the learned counsel for the respondents, we take the view that the appeal must be allowed in part and the case be remitted to the trial court. Our reasons, inter alia, are as follows:

I

- (a) the learned judge had on the face of the record failed to ascertain the value of the assets before dealing with the issue of remuneration; and
- (b) taking into consideration the consent order, the provisions of s 43 of the

A PPA 1959 as well as s 46 of the TA 1949, a mistrial has indeed occurred leading to substantial wrong and/or miscarriage of justice.

[12] In consequence, it is a fit and proper case to remit the matter to the High Court with orders and/or directions as stated earlier, with no order as to costs and deposit is to be refunded.

We hereby order so.

Appeal allowed in part with no order as to costs.

C Reported by Dzulqarnain Ab Fatar

D

E

F

G

H

I